

Administrative Record

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April 12, 1990

VIA HAND DELIVERY

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Site East Helena
File # 1.04.04.00 and 2.06
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Admin. Record: Yes ☒ No ☐
Key Words/Comments: ASARCO's
response to Notice Letter
and Consent Decree for
Process Ponds

RE: East Helena Site: Process Ponds Consent Decree

Dear Sandra:

Based upon our initial review of EPA's proposed consent decree ("the consent decree" or "the decree") for the Process Ponds operable unit at the East Helena Site ("the Site") Asarco has identified several provisions that cause us concern. The purpose of this letter is to bring these general concerns to your attention so that all parties will be fully prepared to discuss them at our meeting scheduled for April 18, 1990.

This letter is not intended to be Asarco's response to EPA's Special Notice letter. As required by the Special Notice letter, a more detailed, paragraph by paragraph discussion of the individual provisions of the decree will accompany the letter setting forth our good faith offer to conduct and finance the necessary remedial design/remedial action for the Process Ponds operable unit.

1. The Site name is "East Helena Site," which was listed on the National Priorities List on September 21, 1984. 49 Fed. Reg. 37070, 37083.

2. Section V of the decree requires EPA's prior approval of "all activities carried out at the Site." Asarco has expended substantial time and resources to install the new above-ground storage tanks at Lower Lake, to initiate excavation of sediments in areas surrounding the speiss pit and pond and to construct an above-ground tank to replace the speiss granulating pond.

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Although Asarco assumed some risk in performing these remedial activities prior to the issuance of the Process Pond Record of Decision ("ROD"), these remedial activities were performed in accordance with the subsequent ROD and all applicable or relevant and appropriate requirements. Because EPA was fully aware of these activities and tacitly approved them, Asarco believes that EPA should now expressly approve this already-completed work.

3. The decree states that the defendants will be responsible for attaining additional or more stringent applicable or relevant and appropriate requirements (ARARs) if the ARARs change during the course of remedial activities. The revised NCP, issued on March 8, 1990 and effective April 9, 1990, requires that ARARs be "frozen" at the time the ROD is signed. Therefore, EPA's own regulations require the defendants to attain only those ARARs set out in the ROD.

4. Related to ARARs, the decree requires the defendants to achieve the more stringent remediation level should the ROD and the Work Plan differ in the level each provides. Any differences in remediation levels between the ROD and the Work Plan should be identified and resolved prior to the execution of this decree, thereby eliminating potential problems and ensuring that the remediation levels specified by both the ROD and the Work Plan are consistent. If this is not possible, the ROD should be the governing document for remediation levels.

5. Section VI requires the defendants to conduct all activities and perform all work under the terms of the decree in accordance with state and federal laws and regulations, as well as EPA guidance. Asarco objects to the applicability of EPA guidance to the activities and work performed under the terms of this decree. EPA guidance is not legally binding on either EPA or the defendants and is therefore inappropriate for inclusion in the consent decree.

6. Asarco objects to the provision requiring defendants obtain financial assurance on or before the effective date of the decree; this requirement is overly burdensome, unnecessary for a company with Asarco's financial stability, and may be impossible to satisfy.

Of equal concern are the amounts of insurance coverage required by the proposed decree as well as all contractors performing work pursuant to the decree. The required amounts are excessive and would preclude Asarco from obtaining contractors to perform the remedial activities. Adequate protection for the United States against liability arising out of the acts of the defendants or their contractors can be obtained without such

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prohibitively high amounts of insurance coverage. Further, such an insurance requirement is duplicative of the financial assurance requirement and may therefore be unnecessary.

7. While Asarco recognizes the need to avoid unwarranted delays in the implementation of the decree and to expedite the successful completion of all remedial activities, the time limits imposed by the decree are simply unrealistic. EPA must extend the decree's time limitations to allow sufficient time to respond to EPA notices, to provide required reports or to challenge EPA's assessment of costs, contractors or penalties. Under the decree's current time limitations, Asarco will be subject to penalties not for failing to comply with legitimate remedial requirements, but for missing artificial deadlines.

Further, the decree's reporting requirements are particularly burdensome and serve no apparent purpose. Under the terms of the current Administrative Order on Consent entered into between EPA and Asarco to conduct the RI/FS, Asarco already prepares and submits bi-monthly progress reports to EPA. This decree's requirement for detailed monthly progress reports as well as daily and weekly construction reports is unnecessary, duplicative and overly burdensome. Written bi-monthly reports have thus far proved adequate to advise EPA of activities at the Site; therefore, Asarco proposes to continue reporting at the same interval.

8. The proposed decree requires the defendants to employ a full-time, on-site inspector and a Project Coordinator both of whose responsibilities are to oversee the implementation of the decree. Requiring defendants to employ two individuals to perform identical tasks is unnecessary and wasteful of time and resources. The duplication of oversight responsibility would also complicate and confuse an already complex remediation and implementation process.

9. The provision governing the authority of the On-Scene Coordinator ("OSC") to initiate response actions is vague and ambiguous and should be clarified to make clear the OSC does not have authority to demand additional work be performed under the guise of a response action.

10. Asarco is unaware of any EPA authority that requires establishing a central document control system and preparation of inventories of the documents contained in the central file every six months. Further, EPA has provided no citation which purports to grant it the authority to require the establishment of an "automated data management system" to fulfill its documentation and record retention requirements. While EPA may have the

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authority to require the defendants to maintain appropriate records related to the work performed under the terms of the decree; EPA does not have the authority to mandate those records be either maintained or retained by way of an expensive computerized data management system. Asarco objects to this overreaching provision.

11. With respect to past response costs, the language of the proposed decree would require the defendants to waive their right to demand satisfactory documentation from EPA for those costs. Asarco has both a legitimate and a legal right to require EPA to support its demand for past response costs with satisfactory documentation. Asarco will not waive those rights, and should not be expected to waive them in order to present an acceptable good faith offer.

12. The stipulated penalty provisions of the proposed decree contain a number of inappropriate requirements. In the first instance, the penalties themselves are excessive, both in amount and in circumstances where they may be assessed. These excessive penalties fail to take into account the willingness of Asarco to work cooperatively with EPA to implement the Process Ponds ROD, as well as recognize the successful working relationship we have developed over the past several years. No valid purpose is served by attempting to apply such obviously punitive penalties. In addition, penalties should not begin to accrue until any dispute regarding the imposition or amount of an assessed penalty is resolved according to the decree's dispute resolution provisions or some additional time is provided for revising documents. Further, the stipulated penalties should not be permitted to exceed an agreed upon maximum daily penalty. Finally, Asarco is not aware of any EPA authority which would permit the Agency to impose a "handling charge" on overdue penalties or a six percent "penalty charge". EPA's authority is limited to assessing civil penalties as defined by CERCLA and for failure or refusal to comply with any term or condition of the decree. These two charges should be removed from the decree since EPA lacks authority to impose such charges.

13. The Force Majeure provision that requires the defendants to notify EPA of any circumstances constituting a force majeure within 24 hours is unrealistic and probably unattainable. Unfortunately, the timing and duration of an event or circumstance which either delays or prevents the completion of a task required under the decree is not always within Asarco's ability to control. As a result, the notification time period must be increased to allow adequate time for defendants to evaluate all legitimate circumstances which might constitute a force majeure. Under the proposed language, Asarco would be

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forced to engage in unnecessary reporting simply to ensure that proper notice was given in order to protect a claim of a force majeure.

14. Asarco objects to the provisions of the proposed decree which limits its ability to convey real property subject to the terms of this decree.

15. Asarco objects to the provision under which they are deemed to have waived any evidentiary objection to the admissibility of data generated by EPA. According to the terms of the Administrative Order on Consent governing the RI/FS, EPA and Asarco have already waived their rights to object to the admissibility or authenticity of data generated by one another during the RI/FS process. An additional agreement in which these parties agree to waive their evidentiary objections is duplicative and unnecessary.

16. The United States should also agree to hold harmless and indemnify Asarco from all claims which arise from the acts or omissions of the United States, its agents, contractors, consultants, and employees in carrying out the work required by or undertaken pursuant to any provision of this decree.

17. The requirement that any and all reports submitted to the United States pursuant to the decree be accompanied by the certified statement of a responsible corporate officer is overreaching. EPA has cited no authority which requires this certification. Nor has EPA provided any valid justification for imposing such an onerous requirement. In the absence of any authority or justification, Asarco objects to this provision.

18. Asarco objects to the decree binding Directors of Asarco in their individual capacities.

19. Asarco objects to the arbitrary and capricious standard of review and the limitation of any review to the administrative record for dispute resolutions and stipulated penalties.

20. Asarco objects to periodic audits of laboratories as unnecessary. Existing laboratory certification processes should be sufficient to satisfy EPA as to the capabilities of individual laboratories.

21. A covenant not to sue should also be included in this decree. Asarco will provide proposed language for such a provision at the meeting on April 18, 1990.

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As mentioned above, this letter does not include all of Asarco's comments with respect to the proposed consent decree. It does, however, address certain issues which Asarco believes may present obstacles to achieving a good faith offer.

Finally, Asarco has requested detailed documentation to support EPA's request for payment of past response costs. EPA has provided limited documentation to date and indicated additional documentation will be provided as it becomes available. Asarco is concerned that sufficient documentation will not be provided by EPA in time to meet the upcoming May 1, 1990 date for presenting a good faith offer. It is critical Asarco receive this information as soon as possible.

Please call us with any questions you might have. We look forward to meeting with you on April 18, 1990 to further discuss these issues.

Sincerely,



Cynthia S. Leap
Peter W. Downing
for Holland & Hart

CSL/PWD:ls

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